

June 25. 1759.

A N S W E R S

F O R

John Robertson of Pitmillan, and others, Executors of the deceased James Maccomie Merchant in Aberdeen, and Isabel and Janet Middletons, his Grandchildren, Pursuers,

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The PETITION of *Isabel and Rachel Strachans, Children of William Strachan late Merchant in Aberdeen, and Andrew Walker Husband to the said Isabel, for his Interest, Defenders.*

THE Fact upon which the present Question depends, having been so fully stated by the Respondents (who shall be here called the Pursuers) in their Petition reclaiming against a Branch of the Interlocutor, and not controverted by the Defenders in their Counter-petition and Answers, the Pursuers will not have Occasion to trouble your Lordships with a full Recapitulation of it.

It is material, however, to observe, that the Pursuers Debt, for which they are now suing, is unchallenged and unexceptionable.

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able. The only Questions then between the Parties are, Whether the younger Children of *William Strachan*, the original Debtor, shall at all be liable in payment? and if liable, Whether they shall only be so *subsidiariè*, after discussing the Cautioner of their elder Brother, who was confirmed Executor to their Father; or immediately, without such Discussion? The Lord Ordinary found, That both they and the Cautioners were conjunctly liable to the Pursuers, but superseded Execution against the *Strachans*, till the Representatives of the Cautioner should be discussed. The Pursuers, in their reclaiming Petition, stated to your Lordships the Reasons upon which they apprehend they ought not to be obliged to discuss the Cautioner's Representatives, in the first place. And as Mr *Strachan's* Daughters have now disputed the other Part of the Interlocutor, the Pursuers shall here endeavour to show Cause, why these Ladies ought to be subjected ultimately in payment of the Debt.

The Pursuers must, in the Entry, submit to your Lordships the Consideration of the Competency of the Petition they are now to answer.

The Lord Ordinary's Interlocutor was pronounced on the 6th of *July* 1758. The Pursuers thereupon presented a Representation, against being limited to discuss the Representatives of the Cautioner in the Confirmation. That Representation was, on the 20th of *July*, appointed to be answered. The Appointment was renewed at a Calling on the 27th of that Month; and the Pursuers waited, in expectation of the Answers, so long as the 4th of *January* 1759; when no Answers being given in, the Order was renewed again, with Certification. The Time limited elapsed; and on the 18th of *January*, the Order was once more renewed, to a precise Day. Then, and not till then, the two Sisters gave in their Answers, thrown into the Form of a Counter-representation against the other Branch of the Interlocutor, pronounced seven Months before. This Counter-representation the Lord Ordinary did not appoint to be answered; but, on the 22d of *February*, refused the Pursuers Representation,

presentation, and adhered to his former Interlocutor of the 6th of *July*.

Again, although the Pursuers thereupon, in due Time, reclaimed to your Lordships, in so far as the Interlocutor went against their Plea, and their Petition was ordered to be answered ; yet no Petition on the Part of *Isabel* and *Rachel Strachans* was presented, against the more material Branch of the Interlocutor affecting them, from the 22d of *February* to the End of the Session, on the 11th of *March*. The Defenders followed their old Method ; and when their Answers to the Pursuers Petition, according to your Lordships Appointment, were given in, on the second Sederunt-day of *June*, they appeared in the Form of a Counter-petition. The Pursuers therefore apprehend, that the Point now disputed by the Defenders, was twice closed and concluded against them ; and that both their Representation against the Interlocutor of the 6th of *July*, presented at the Distance of more than seven Months ; and their Petition against that Interlocutor, and the subsequent one of the 22d of *February*, were altogether incompetent.

Your Lordships have limited the Privilege of reclaiming, both in the Outer and Inner House, to a certain Number of Days, upon the justest Grounds of Expediency ; and should Parties be indulged in a total Neglect of such salutary Regulations, the Consequences would be extremely pernicious. It is indeed true, that the Pursuers first represented, and then reclaimed against that Part of the Interlocutor which restricted the Effect of their Decree against the *Strachans* to the Event of a Discussion of the Cautioner in the Confirmation : But, with great Submission, their so doing could not keep open the other Branch of the Interlocutor, of which they had no Reason to complain. The Interests of various Parties, as well as a Variety of different Points, may be determined by the same Interlocutor : But if it should be established as a Rule, That the reclaiming of any one Party concerning a single Point, keeps the Interlocutor open as to the whole, in many Cases a Judgment might be opened,
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after an Acquiescence for any Length of Time. Upon these Grounds, the Pursuers submit the Competency of the Defenders Application to your Lordships, and shall proceed to consider the Merits of the Case, supposing it to be competent.

It may be necessary for your Lordships to observe, that *William Strachan senior*, the Pursuers Debtor, did, on the 16th of *April 1735*, execute a Latter-will and Testament, by which he appointed *Rachel Baxter*, his then Spouse, to be his sole Execatrix, and directed her to convert his whole Means and Effects into Money, and to lay out the same upon sufficient Security ; “ and, after Payment of his just and lawful Debts, he thereby “ legated to his two Sons, *William* and *James Strachans*, two “ third Parts of his haill Effects, including the Value of his “ Heritage, to be imputed into their Shares, and to his two “ Daughters, *Isabel* and *Rachel Strachans*, the other third Part “ of his haill Effects : ” And likewise made Provision for his said Spouse, which it is unnecessary to resume.

Rachel Baxter predeceased her Husband ; and Mr *Strachan* himself died in the 1747. Upon his Decease, *William Strachan*, his eldest Son, was confirmed Executor, *qua* nearest in Kin to him ; and *James Dyce* of *Dyce-Blair* became Cautioner in the Confirmation. In the Inventory, the Shop-debts due by the Defunct, who was in Copartnery with his eldest Son, were deduced ; and there remained a Balance of *L. 700 Sterling*, as the Defunct's Share of the Copartnery-subjects : But neither the Debt due to the present Pursuers, nor any other proper Debts of the Defunct, were deduced ; so that the same remained a Burden upon the Sum given up.

The Executor administrated in such Manner as he and his Brothers and Sisters thought fit. To each of them, it is agreed, he paid or gave Security for a Part of the Executry. *Isabel* and her Husband have in this Process acknowledged, that, besides 3000 Merks paid by her Father at her Marriage, they received *L. 100* from the Executor. And the other Defender, *Rachel Strachan*, has acknowledged, that she received a Bond from him

him in the 1749 for *L. 240 Sterling*, since paid; and it is informed, that that Payment was made so late as the 1754. These Sums, amounting all together, to about *L. 505 Sterling*, certainly exceeded the third Part of the Defunct's free Effects, intended for them by his Settlement 1735.

William Strachan the Executor made also some Payments to the Pursuers, which reduced their Debt, in the 1754, to a Balance of *L. 383 : 6 : 8 Scots*; but becoming insolvent towards the End of that Year, the Pursuers were obliged to bring this Process against the whole Representatives of their Debtor, which has depended since the 1755. The Pursuers considered it as a Favour done to the Defenders themselves, not to insist rigorously for full Payment till the Executor had Opportunity to recover the Defunct's Effects. At the same time, as the Pursuers acted for Pupils or Infants, they thought proper to take such Payments as they could easily obtain: And the Defenders are certainly obliged to them for having shown an Inclination to have them relieved as far as possible, without Prejudice to the Right of those for whom they acted. However, as the Executor's Insolvency happened before he had executed the Trust by paying their Debt, and even, as it appears, soon after he had settled with the Defenders themselves, the Pursuers must now be excused from operating their Pupils Payment as they best can. And notwithstanding what is said in the Petition, they do apprehend, that no Point in Law can be clearer, than that the Defenders, *Isabel* and *Rachel Strachans*, must be liable to them *in valorem* of the Share they received of their Father's Effects, which far exceeds the Extent of the Debt pursued for.

The Position which the Defenders have endeavoured to establish is this, That if, at the Testator's Decease, there be a sufficient Fund for Payment of the Legacy, after deducing the Extent of the Debts, and the Legacy is accordingly paid, the Legatee cannot be liable in Repetition to the Defunct's Creditors, in the Event of the Executor's failing to pay his Debts, or becoming insolvent without clearing such Debts.

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This Doctrine the Pursuers can by no means approve. They have learned that by the Civil Law, which is the Foundation of the Law of *Scotland* in this Matter, Legacies were only due *deductis debitis*, and that a Legatee in general was not intitled to recover Payment of the Sum bequeathed to him, till he gave Security, if required, *cautione Muciana*, to refund the same, in case any Creditors of the Testator should appear to be unsatisfied. The *Romans* rightly held it unjust, that a Legatee should enjoy any Part of the Sum left to him, while the Debts of the Testator were unpaid; and although some Legatees were more favoured than others, yet it was a general Rule, that the Creditors at all Events should be satisfied.

Vol. 1. p. 274. Upon the same Principles, the Law of *Scotland* has taken every possible Method for securing the Payment of Creditors, in preference to Legatees, and all other gratuitous Successors of the Defunct. It is true, the *cautio Muciana*, chiefly calculated to secure the Heir or Administrator, has not generally prevailed with us; although, by a Decision, observed in the Dictionary, 29th March 1627, *Craigmillier*, it appears that such Security has been sometimes practised. A Right, however, in most Cases sufficient for the Creditor's Security, has always obtained. He has had an Action of Repetition against the Legatees who have received Payment from the Executors before satisfying the Testator's Debts.

Tit. Execu- Lord *Stair* expressly tells us, that in case Creditors of the try, § 70. Defunct shall claim, after the Executor has made *bona fide* Payment to the Relict, Bairns, or Legatars of the Defunct, "there
" is competent to such Creditors *Action of Repetition* against
" the Relict, Bairns, or *Legatars*, which will be instructed by
" the Discharge to the Executors." To this excellent Authority the Pursuers beg Leave to add another more modern, though
Vol. 2. p. 401. very respectable one. The Author of the new Institute expresses himself thus: " Even Payment of Legacies, or to the
§ 91. " Wife, or nearest of Kin, of their Shares, upon lawful Sentence, will be a good Defence against Creditors who had not
" interpellated

“ interpellated the Executor before such Payment, unless the
 “ Debts were consistent with his own Knowledge; and the Cre-
 “ ditors must pursue the Receivers for their Payment.”

Thus it is established, upon the best Authority of our Law, and not upon *palpable Mistake*, (as the Defenders not very politely express themselves), that Legatees are liable in Repetition to the Creditors of the Defunct, where the Recovery of Payment from the Executor is any way obstructed. The Pursuers have, in their Petition, endeavoured to show, that Creditors are not even obliged to discuss the Executors, but are at Liberty to seek their Payment where they can readiest find it. It is sufficient, however, in answering the Defenders Petition, that the Legatees are proved to be ultimately liable *in valorem*. It is, indeed, scarce possible, to figure a Rule of Law more clearly founded in Reason and natural Justice. The Subject of Legacies can only be what belongs to the Testator, or for procuring which he has left a sufficient Fund. What is necessary for Payment of his Debts, does not belong to him; and to permit him to bequeath the Fund of such Payment to any Person, would be giving him the Disposal, not of his own Goods, but of those belonging to others.

The Pursuers have here considered the Case in the strongest Light it can be put in for the Defenders. They have supposed the Executor to have been nominated by the Testator, and the Legacies to have been certain Sums bequeathed by him to Strangers, without any Burden expressly imposed upon them; and have shown, that the Rule of Law would still operate against the Defenders. But your Lordships will observe, that Matters do not so stand. *William Strachan*, by his Testament, did not leave any precise Sum to the Defenders: He expressly ordained his whole Debts to be paid in the first place, and then only appointed a third Part of the Residue to be given to the Defenders his Daughters. In the Civil Law, one to whom a certain Portion of the Testator's Goods were thus bequeathed, was called a *legatarius partiaris*: And *Voet*, on the Authority

of the Text itself, acquaints us, that the Share of such a Legatar was burdened with the Testator's Debts, even without his special Appointment to that Effect. *Ubi enim pars bonorum relinquitur, deduci primo debet et alienum, pretia servorum manumissorum, aliaque his similia.* Here Mr Strachan's Debts were, even by his own Will, as well as by the Destination of Law, a Burden imposed on all and every Part of his Subjects, and consequently affected every Portion of his Means, in whatever Hands the same might be found. Till these Debts were paid, the Defenders, therefore, had no Title to draw one Farthing; and if they drew any Part sooner, they behoved to take it under the Burden to which it was subjected.

De legat.
§ 19.

But further, to show the Defenders Plea in a still weaker Light if possible, the Pursuers must desire your Lordships to attend to the Manner in which Things were managed upon Mr Strachan's Decease. The Executor nominated in the Testament having predeceased him, the Defenders did in no Shape whatever establish their Right on the Footing of that Deed. As Legatees, they might have obtained a Confirmation, had they been disposed to have supported the Settlement; and being equally near of Kin to the Defunct, they also, in that Character, were all alike intitled to the Office of Executor. They, however, did not confirm as Legatees; neither did they take out a joint Power of Administration, in right of their Propinquity: But they did what was equivalent to the latter, though absolutely inconsistent with the former; they made choice of their eldest Brother to act for the whole; and he was accordingly decerned and confirmed sole Executor, in Quality of *nearest of Kin*. Under that Character, he intromitted with the whole Effects of the Defunct, and made such Division, as he and his Brothers and Sisters agreed among themselves, without respect to the Testament, the Proportion drawn by the Sisters being apparently greater than was thereby provided to them. But supposing it to have been no greater, still it must be agreed, that an Executor of any kind, is not a Representative of the Defunct,
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in the same extensive Sense as an Heir of an heritable Subject: He is truly only an Officer or Trustee for all concerned. But, in this Case, he was more especially a Trustee for the Defenders themselves. He was indeed, *quoad* their Interests, no more than their Factor or Administrator; and consequently they, so far at least as they received, were equally with him Representatives of their common Father.

The Pursuers therefore apprehend, that the Defenders fall in this Question to be considered in the same Light, as if they had been conjoined with their Brother in the Office of Executor; and that being so, it cannot be disputed that they are all liable to the Creditors. The Pursuers indeed have no Occasion to insist against them, further than *in valorem* of what they received; but that Length they must, at any rate, be liable. Had they taken any Part of the Defunct's Effects, by a Disposition *mortis causa*, they must, in so far, have been liable as Heirs of Provision, even had they been Strangers to his Blood; but when it is considered, that in Fact they drew a Proportion of the Effects, as Children and nearest of Kin to the Defunct, it seems impossible to dispute, with any Show of Reason, their being proportionally subject to his Debts. Their Election of one of their Number to act for them as Executor, could never prejudice the Interest of Creditors, who had no Concern in such Nomination. Should such a Confirmation and Division made by the Executor, have the Effect contended for by the Defenders; it is obvious, that the Children of a Defunct, succeeding equally as next of Kin, might easily order Matters so as to enjoy the whole Effects, and not pay one Farthing of the Debts. In fine, if the Defenders Trustee did not faithfully discharge the Duties of his Office, they may have Relief against him or his Cautioner, but the Right of third Parties must be entire. The Confirmation in the Person of their Brother, may indeed free them from being universally liable on the passive Title of vitious Intromission; but still, as Intromitters or Receivers of Part of the Defunct's Effects *sine titulo oneroso*, whether in
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Quality of Legatees, or *a fortiori* in Right of Blood, as next of Kin to him, they must be *in valorem* liable to the Pursuers in Payment of the Defunct's Debt.

The Pursuers will not inroach further on your Lordships Time. What they have offered, they humbly apprehend is sufficient to support that Part of the Interlocutor which the Defenders complain of: And they shall conclude with observing, that the same Arguments evidently tend to support their own Plea, for being freed from the necessity of first discussing the Cautioner of the Executor, who was in this Case apparently no more than the Trustee or Factor of the other Defenders. But having already argued that Point, particularly in their own Petition, to which no direct Answer has been made, they think it their Duty, to leave it as it stands, to your Lordships Consideration.

In respect whereof, &c.

DAV. RAE.

